Supreme Court, U.S.
FILED

No. 10-_____

10-325 SEP 2 2010

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In The

Supreme Court of the United States

EDWARD L. DUTTON,

Petitioner,

v.

MONTGOMERY COUNTY, MARYLAND, CAPTAIN SAM HSU, OFFICER SUGURE, MARCUS WESTOVER, LT. MARCUS JONES AND JOY TURNER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

EDWARD L. DUTTON
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Sandy Spring, Maryland 20860
202-288-6710

QUESTION PRESENTED FOR REVIEW

Is it a denial of Due Process for a court to ignore a viable claim of a plaintiff in a civil rights case and substitute a claim not made by plaintiff, which the court then dismisses as failing to state a cause of action upon which relief can be granted?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	7

INDEX TO APPENDICES

Court of Appeals Opinion	App. 1
District Court Opinion	App. 3
Court of Appeals Order	App. 25

TABLE OF AUTHORITIES

Page

CASES

Brever v. Rockwell Inter. Corp., 40 F.3d 1119 (10th Cir. 1994) 6

Deubert v. Gulf Fed. Sav. Bank, 820 F.2d 754 (5th Cir. 1987) 6

Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971) 5

Jones v. Alfred H. Mayer, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) 5

McCord v. Bailey, 636 F.2d 606 (D.C. Cir. 1980) 5

United States v. Price, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966) 5

CONSTITUTIONAL PROVISIONS

14th Amendment to the U.S. Constitution 2

STATUTES & RULES

28 U.S.C. §1257(a) 1

42 U.S.C. §1981 3

42 U.S.C. §1982 3

42 U.S.C. §1983 3

42 U.S.C. §1985(2) 1, 2, 3, 6, 7

42 U.S.C. §1986 ..... 3, 6

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at App. 1 to the petition and is unpublished. The memorandum opinion of the United States District Court of Maryland appears at App. 3 to the petition. The order denying the petition for rehearing appears at App. 25 to the petition.

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals decided my case was March 2, 2010.

A timely petition for rehearing was thereafter denied on April 6, 2010, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the United States Constitution and 42 U.S.C. §1985(2):

14th Amendment

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1985(2)

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course

> of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

STATEMENT OF THE CASE

Dutton filed a law suit in the United States District Court for the District of Maryland alleging violations of §1981, §1982, §1983, §1985(2), and §1986, as a result of a campaign of harassment and retaliation against Dutton and his family as a result of Dutton having twice filed Federal Civil Rights law suits against members of the Montgomery County Government and Police Department.

By Memorandum Opinion, dated August 11, 2009, the District Court granted the defendants' motion to dismiss the plaintiff's complaint.

The petitioner appealed this decision to the U.S. Court of Appeals for the Fourth Circuit, which affirmed the District Court's dismissal of Dutton's complaint, on March 2, 2010, simply stating that "they find no reversible error, accordingly we affirm for the reasons stated by the District Court." Dutton filed a timely motion for rehearing which motion was also denied by the Court of Appeals on April 2, 2010.

REASONS FOR GRANTING THE PETITION

The Court of Appeals has sanctioned a departure by the District Court from the usual and accepted course of judicial proceedings so that it requires this Court to exercise supervisory power over them.

The District Court judge twisted the evidence presented in the case so that it would appear to anyone that read her decision dismissing Dutton's complaint that Dutton, instead of being a victim of police retaliation for having twice in the past filed federal civil rights suit against Montgomery County, Maryland and various members of the Montgomery County Police Department, was a brazen drug dealer who would proudly display his illegal drugs to others and then complain when this caused the police to take an interest in him.

In addition the District Court judge inserted facts into the record that had no basis in fact, such as Dutton invited drug informants into his home and that one of the defendants Lt. Marcus Jones obtained a warrant for the arrest of Dutton based on drugs that he knew had been planted in Dutton's home.

Dutton filed a federal civil rights case in which one of his contentions was that the defendants had retaliated against him for having in the past filed two federal civil rights lawsuits against other members of the Montgomery County Police Department, Case No. DKC-94cv-01835 and Case No. DKC-97cv-1797. Both of these case were assigned to the same judge as the judge in this case. This was done in violation of

§1985(2) which prohibits someone from injuring the person or property of a civil rights plaintiff for having attended or testified in a federal civil rights case.

Both the District Court and the Court of Appeals completely ignored this aspect of Dutton's complaint. Instead of addressing the issue raised by Dutton the courts below reasoned that since, at the times of the police misconduct set forth in the complaint, that Dutton did not have a pending federal civil rights case he could not have been prevented from testifying in a federal civil rights case when none was pending. Dutton made no such claim in his complaint, his case, instead Dutton alleged that he was retaliated against for having been a federal civil rights plaintiff. The District Court in her decision states that the plaintiff must allege a specific class-based, invidiously discriminatory animus. The court is wrong, "According to the Supreme Court, the Reconstruction civil rights acts are to be 'accord(ed) a sweep as broad as (their) language.' *Jones v. Alfred H. Mayer*, 392 U.S. 409, 437, 88 S.Ct. 2186, 2202, 20 L.Ed.2d 1189 (1968) (quoting *United States v. Price*, 383 U.S. 787, 801, 86 S.Ct. 1152, 1160, 16 L.Ed.2d 267 (1966)). Accord, *Griffin v. Breckenridge*, 403 U.S. 88, 97, 91 S.Ct. 1790, 1795, 29 L.Ed.2d 338 (1971). Given the manifest meaning and the absence of reason for restrictive reading, we do not believe a class-based, invidiously discriminatory intent is an element of a cause of action under the first clause of section 1985(2). See, e.g., *Brawer v. Horowitz*, 535 F.2d at 840." *McCord v. Bailey,* 636 F.2d 606 (D.C. Cir. 1980).

The court also states Dutton must show a meeting of the minds to violate claimant's constitutional rights. This also is wrong, "To succeed on a retaliation claim, Ms. Pitts must allege a conspiracy, a nexus between the conspiracy and her grand jury testimony, and injury on account of having testified. *See Deubert v. Gulf Fed. Sav. Bank,* 820 F.2d 754, 758 (5th Cir. 1987). As we noted above, Ms. Pitts alleges a sequence of events sufficient to permit an inference of a 'meeting of the minds' of the conspirators. The nexus between the conspiracy and the grand jury proceeding is also clear, as the conspiratorial acts that began soon after the FBI raid continued and became progressively more severe after Ms. Pitts testified." *Brever v. Rockwell Inter. Corp.,* 40 F.3d 1119 (10th Cir. 1994).

The court was also wrong in that it did not address appellant's claim under §1985(2) for retaliation only stating that appellant did not allege the use of force, intimidation of threats to hinder him from testifying in a pending matter. The court ignores the claim appellant actually made that he was retaliated against, by the defendants for having been a federal civil rights plaintiff in two prior federal civil rights lawsuits DKC-94cv-1835 and DKC-97cv-1797 and having testified in DKC-94cv-1835.

Since the court dismissed appellant's §1985(2) claim the court stated appellant could not make a claim under §1986. Since the court was wrong in dismissing appellant's §1985(2) claim, it was wrong in stating appellant could not make a §1986 claim.

Dutton has been denied Due Process as a result of the courts below ignoring his claim under §1985(2) and instead finding that he filed a case based upon being hindered and prevented from testifying in a pending federal civil rights suit is an extreme departure from the ordinary course of justice. It also appears that the Court of Appeals did not even read any of the papers filed by Dutton in his appeal because if it had it would have seen that the District Judge misstated and mischaracterized Dutton's §1985(2) claim.

This Court must exercise its supervisory power over both the Court of Appeals and the District Court in this case to remedy the actions of the two lower courts in denying Dutton Due Process.

The conduct of the District Court in creating false allegations that Dutton was involved in drug activity and that he allowed drug informants on his property and in his home was done to justify the court's denial of Dutton's Due Process rights.

CONCLUSION

The U.S. District Court for the District of Maryland denied Dutton Due Process of law as guaranteed him by the Constitution by ignoring Dutton's claimed violation of 42 U.S.C. §1985(2) for retaliation for having in the past maintained and testified in a civil rights case and in its place substituting a claim that plaintiff is being injured as a result of his taking part

in a pending civil rights case and then dismissing the case because there was no pending civil rights case at the time the actions took place.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD L. DUTTON
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Sandy Spring, Maryland 20860
202-288-6710

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-2016

EDWARD L. DUTTON,

Plaintiff-Appellant,

v.

MONTGOMERY COUNTY MARYLAND; SAM HSU, Captain; MARCUS WESTOVER; D. SUGURE, Officer; JENNIFER POWELL, Officer; MARCUS JONES, Lieutenant; JOY TURNER,

Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Deborah K. Chasnow, Chief District Judge. (8:08-cv-03504-DKC)

Submitted: February 25, 2010 Decided: March 2, 2010

Before DUNCAN and AGEE, Circuit Judges, and Hamilton, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Edward L. Dutton, Appellant Pro Se. Patricia Prestigiacomo Via, Chief, Edward Barry Lattner, COUNTY ATTORNEY'S OFFICE, Rockville, Maryland; Danielle E. Marone, Jo Anna Schmidt, SCHMIDT, DAILEY & O'NEILL, LLC, Baltimore, Maryland; James F. Shalleck, Montgomery, Maryland; Lindsay Nichole Warnes, Rockville, Maryland; Jessica Lynn Ellsworth, Steven Paul Hollman, HOGAN & HARTSON, LLP, Washington, D.C. for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Edward L. Dutton appeals the district court's order dismissing his civil action. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *See Dutton v. Montgomery County Maryland.* No. 8:08-cv-03504-DKC (D. Md. Aug. 11, 2009). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EDWARD L. DUTTON	:	
	:	Civil Action
v.	:	No. KC 2008-3504
MONTGOMERY COUNTY, MARYLAND, et al.	:	

MEMORANDUM OPINION

Presently pending and ready for resolution in this case arising under 42 U.S.C. § 1983 are: (1) a motion to dismiss filed by Defendants Montgomery County, Maryland, Officer Daniel Sugrue, Officer Jennifer Powell, and Lieutenant Marcus Jones (Paper 11);[1] (2) a motion to dismiss filed by Defendant Captain Sam Hsu (paper 20); (3) a motion to dismiss filed by Defendant Marcus Westover (paper 14); and (4) a motion to dismiss filed by Defendant Joy Turner (paper 22). The issues are fully briefed and the court now rules pursuant to Local Rule 105.6, no hearing being deemed necessary. For the reasons that follow, Defendants' motions will be granted.

I. Background

Plaintiff Edward Dutton is a resident of Sandy Spring, Maryland. Defendants are Montgomery County, Officer D. Sugrue, Officer Jennifer Powell,

[1] Plaintiff incorrectly identifies Officer Daniel Sugrue in his complaint as D. Sugure. The correct spelling will be used here.

and Lieutenant Jones of the Montgomery County Police Department, Captain Sam Hsu of the Montgomery County Fire Marshall's Office, Marcus Westover, Plaintiff's former neighbor, and Joy Turner, President of the Sandy Spring Civic Association. In his complaint, Plaintiff also discusses the alleged actions of Officer LaFlure, Commander Walker, Officer Yamanda, Officer Berkeimer, Officer Wallace, Officer McFarland, Officer Corseito, and Officer Williams. Plaintiff, however, does not name any of these individuals as defendants in this action. Therefore, only the allegations against the named defendants will be discussed here.

In or about March 2002, several Montgomery County police officers came to Plaintiff's home at 4:30 a.m. and demanded to speak to Plaintiff about a car parked at the home of Plaintiff's aunt. Plaintiff alleges that five months later, an officer entered into a conspiracy with Defendant Marcus Westover, Plaintiff's neighbor, to create false records about Plaintiff and to cover up the harassment he suffered at the hands of "police informants and racist adults." Westover allegedly agreed to claim falsely that there was drug activity in Plaintiff's home.

Sometime in September 2003, three white men allegedly yelled threats, racial slurs, and blew their car horn at Plaintiff. Plaintiff appears to allege that on the same day, he exchanged words with a white man and woman who were parked on his property. Plaintiff asked them to leave and never return. Sometime shortly thereafter, two Molotov cocktails were

thrown in his yard and paint balls were shot at his house and car (hereafter called "the firebombing incident").

Defendants Sugrue and Hsu subsequently investigated the firebombing incident. Sugrue and Hsu allegedly refused to interview people who Plaintiff believed were responsible for the harassment and attempted to destroy evidence. Plaintiff also alleges that Sugrue wrote in the report that the matter was drug related, which Plaintiff flatly denies. Plaintiff alleges that Hsu told Plaintiff's neighbors that there was an investigation into an accident at Plaintiff's home involving drugs. According to Plaintiff, the officers failed to investigate properly the hate crime committed against him because Plaintiff had previously filed a civil rights action against Montgomery County and County police officers. Plaintiff alleges that Sugrue and Hsu conspired with one another to treat the matter as a drug related incident and not to investigate it as a hate crime. Plaintiff reported the actions of Sugrue and Hsu to the County Executive.

Plaintiff further alleges that in January 2006, Defendant Marcus Westover pointed a gun at him and demanded to know what he was doing while he was visiting a local cemetery. Westover allegedly intimidated every black person who attempted to visit the cemetery. Plaintiff subsequently spoke about the incident to Defendant Powell and another officer, Officer Williams. Powell refused to make of a report of Plaintiff's complaint and instead issued Plaintiff a trespass notice.

Plaintiff also alleges that Defendant Jones utilized informants who planted 10.95 grams of cocaine on Plaintiff's property, but were never charged. Plaintiff alleges that Jones' informants have a history of harassing Plaintiff.

Finally, Plaintiff alleges that Joy Turner, President of the Sandy Spring Civic Association, coerced a woman to give false testimony about him in depositions and informed the police that he was involved in drug activity and other unlawful conduct. Although extremely unclear, Plaintiff also alleges that Turner "conspired to have people complain to [Plaintiff's] family about Westover interfering with their access to the cemetery and public easement, as a method of creating traffic at [Plaintiff's] residence" (Paper 1 ¶ 42).

Plaintiff, proceeding *pro se*, filed a sixteen count complaint in this court on December 31, 2008 (Paper 1). Plaintiff alleges that Defendants are liable for violations of 42 U.S.C. §§ 1981, 1983, 1985(2), and 1986. All Defendants filed motions to dismiss. (Papers 11, 14, 20, 22).

II. Standard of Review

The purpose of a motion to dismiss pursuant to Fed.R.Civ.P.12(b)(6) is to test the sufficiency of the plaintiff's complaint. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). Except in certain specified cases, a plaintiff's complaint need only satisfy the "simplified pleading standard" of Rule

8(a), *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P 8(a)(2). Nevertheless, "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atl. Corp.. v. Twombly,* 550 U.S. 544, 555 n.3 (2007). That showing must consist of more than a "formulaic recitation of the elements of a cause of action" or "naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009) (internal citations omitted).

In its determination, the court must consider all well-pled allegations in a complaint as true, *Albright v. Oliver,* 510 U.S. 266, 268 (1994), and must construe all factual allegations in the light most favorable to the plaintiff. *See Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 783 (4th Cir. 1999) (citing *Mylan Labs., Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir. 1993)). The court must disregard the contrary allegations of the opposing party. *A.S. Abell Co. v. Chell*, 412 F.2d 712, 715 (4th Cir. 1993). The court need not, however, accept unsupported legal allegations, *Revene v. Charles County Comm'rs,* 882 F.2d 870, 873 (4th Cir. 1989), legal conclusions couched as factual allegations, *Iqbal*, 129 S.Ct. at 1950, or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst,* 604 F.2d 844, 847 (4th Cir. 1979). "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has

alleged, but it has not "show[n]" – "that the pleader is entitled to relief." *Iqbal,* 129 S.Ct. at 1950 (quoting Fed.R.Civ.P. 8(a)(2). Thus, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* Courts generally should hold *pro se* pleadings "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner,* 404 U.S. 519, 520 (1972).

III. Statute of Limitations

At the outset, all Defendants argue that Plaintiff's claims should be dismissed because they are barred by the statute of limitations. The statute of limitations is an affirmative defense that a party typically must raise in a pleading under Fed.R.Civ.P.8(c) and is not usually an appropriate ground for dismissal. *See Eniola v. Leasecomm Corp.,* 214 F.Supp.2d 520, 525 (D.Md. 2002); *Gray v. Metts,* 203 F.Supp.2d 426, 428 (D.Md. 2002). However, dismissal is proper "when the face of the complaint clearly reveals the existence of a meritorious affirmative defense." *Brooks v. City of Winston-Salem, North Carolina,* 85 F.3d 178, 181 (4th Cir. 1996); *see* 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1357, at 714 (3rd ed. 2004) ("A complaint showing that the governing statute of limitations has run on the plaintiff's claim for relief is the most common situation in which the affirmative defense appears on the face of the pleading and

provides a basis for a motion to dismiss under Rule 12(b)(6)."). Here, Plaintiff raises several allegations in his complaint dating back to the year 2000, but he did not file his complaint until 2008. As will be explained below the statute of limitations governing Plaintiff's claims is three years. Thus, the defense is evident on the face of the complaint, and will be discussed here.

The Reconstruction Civil Rights Acts, which include 42 U.S.C. §§ 1981, 1983, 1985, and 1986, do not specifically provide a statute of limitations during which time claims may be brought. *McCausland v. Mason County Bd. Of Educ.,* 649 F.2d 278, 279 (4th Cir. 1981). Therefore, the federal courts borrow an appropriate limitations period from the state in which the claims arose. *Id.* Maryland's general statute of limitations provides that "[a] civil action at law shall be filed with three years from the date it accrues." Md.Code Ann., Cts. & Jud. Proc. § 5-101. The time of accrual is "when [the] plaintiff knows or has reason to know of the injury which is the basis of the action." *Nat'l Advertising Co. v. City of Raleigh,* 947 F.2d 1158, 1162 (4th Cir. 1991). Courts have applied the three year period to 42 U.S.C. § 1985 claims as well. *See Evans v. Chesapeake & Potomac Telephone Co. of Md.,* 535 F.Supp. 499 (1982).

With respect to claims arising under 42 U.S.C. § 1981, the limitations period for suit in Maryland is generally three years. *Int'l Woodworkers of Am. v. Chesapeake Bay,* 659 F.2d 1259 (4th Cir. 1981). However, Defendants point out that under 20 U.S.C. § 1658, Congress enacted a catch-all four year statute

of limitations for causes of action that arose under an Act of Congress enacted after December 1, 1990. The Civil Rights Act of 1991 amended 42 U.S.C. § 1981. Accordingly, any new causes of action that arose as a result of the 1991 Act are now governed by the four year statute of limitations, and not the personal injury limitations period established in the forum state, such as the three year period in Maryland. *See Jones v. R.R. Donelley & Sons,* 541 U.S. 369, 371-72 (2004). Defendants argue that the four year limitations period applies to Plaintiff's § 1981 claims only if the claims were made possible by the amendments in the 1991 Act. *Id.* at 382.

Here, Plaintiff's § 1981 claims appear to be based on an equal protection claim under the Fourteenth Amendment. Therefore, Plaintiff's cause of action predated the 1991 amendments, and the three year statute of limitations period applies to Plaintiff's § 1981 claim. However, an exhaustive analysis is not necessary because as will be discussed below, Plaintiff cannot state a claim under § 1981 against any Defendants irrespective of the statute of limitations issue.

Plaintiff did not file his complaint until December 31, 2008. Therefore, pursuant to the three year limitations period, any claims Plaintiff has for alleged violations of his federal rights are barred if they occurred prior to December 31, 2005. The vast majority of Plaintiff's complaint discusses incidents involving other Montgomery County officers that occurred between May 2000 and May 2004. The only incident

that Plaintiff discusses that falls within the limitations period is the allegation that Defendant Westover pointed a gun at him in 2006, and that Defendant Powell failed to follow up regarding Plaintiff's complaint against Westover.

Plaintiff argues that his claims are not time barred because he did not learn of certain information about the conduct of these individuals until their depositions in another matter in September 2006, October 2006, January 2007, and February 2007. Specifically, Plaintiff contends that it was only during Jones' deposition that he discovered that Jones was sending informants to his home to create a false history of drug activity. Similarly, he learned during Sugrue's deposition that Sugrue and Hsu had told Plaintiff's neighbors that there was drug activity going on at Plaintiff's home. Plaintiff maintains that he would have no means of discovering this information until the time of the depositions, and consequently, the statute of limitations began to run only at the time that he discovered this information. *Nat'l Advertising Co.*, 947 F.2d at 1161-62. Accepting Plaintiff's allegations as true, the allegations against Jones regarding the use of informants as well as the allegations against Sugrue and Hsu about the information conveyed to Plaintiff's neighbors might not be time barred. In addition, Plaintiff's allegation that Westover pointed a gun at him and that Officer Powell failed to follow up on the incident are not time barred because these incidents occurred in 2006, within the limitations period.

IV. Defendants Montgomery County, Officer Sugrue, Officer Powell, and Lieutenant Jones' Motion to Dismiss

Plaintiff asserts: (1) a 42 U.S.C. § 1983 claim against Sugrue and Jones; (2) a 42 U.S.C. § 1981 claim against Sugrue; (3) a 42 U.S.C. § 1985 claim against Sugrue, Powell, and Jones; (4) a 42 U.S.C. § 1986 claim against Sugrue; and (5) a 42 U.S.C. § 1981, 1983, and 1986 claims against Montgomery County.

A. 42 U.S.C. § 1983 Claims Against Sugrue and Jones

Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privilages, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1983. A plaintiff raising a § 1983 claim must show that a person acting under color of state law deprived him of a constitutional right. *Dowe v. Total Action Against Poverty,* 145 F.3d 653, 658 (4th Cir. 1998).

Plaintiff alleges that Sugrue and Jones are liable under § 1983 for violating his rights under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. As previously explained, the only allegations against these Defendants that are not time barred are that: (1) Defendant Jones sent informants to Plaintiff's home in an effort to create a false history of drug activity in Plaintiff's home; and (2) Defendant Sugrue told Plaintiff's neighbors that there was drug activity in Plaintiff's home. Plaintiff does not explain how either of these allegations give rise to a deprivation of his constitutional rights, as is required for Plaintiff to state a claim under § 1983. "Rule 8(a)(2) still requires a 'showing' rather than a blanket assertion, of entitlement to relief." *Twombly,* 550 U.S. at 556. That showing must consist of more than "naked assertion[s] devoid of further factual enhancement." *Iqbal,* 129 S.Ct. at 1949.

First, plaintiff does not explain how Defendants' actions violated his First Amendment rights. In addition, Plaintiff fails to explain how Defendants committed an unreasonable search or seizure under the Fourth Amendment. It is well established that Plaintiff has no constitutional right to possess illegal drugs in his home. *Stanley v. Georgia,* 394 U.S. 557, 568 n.11 (1969); *see also Leary v. United States,* 544 F.2d 1266, 1270 (5th Cir. 1977). Plaintiff flatly denies that there has ever been drug activity in his home. Accepting this allegation as true, police officers nevertheless have a right to investigate potential

criminal activity. Plaintiff's neighbors had informed Defendants that they had seen Plaintiff using drugs.

Plaintiff also appears to allege that Defendants hired informants to come into his home to determine whether any drug activity was taking place. To the extent that Plaintiff permitted drug dealers disguised as informants into his home, Plaintiff has no reasonable expectation of privacy under the Fourth Amendment. *See United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986) (nothing that an owner's interest in the privacy of his home is fatally compromised when he "admits a confidential informant and proudly displays contraband to him" and that "[i]t makes no difference that the owner does not know he is dealing with an informant"). Indeed, "once an individual gives information to a third party, he assumes the risk that the third party will reveal the information to the authorities." *Wilson v. Layne*, 141 F.3d 111, 128 n.15 (4th Cir. 1998).

The only allegation that could potentially trigger a Fourth Amendment violation is that two informants planted cocaine in Plaintiff's home, and Defendant Jones knew about the informant's actions yet did nothing. Planting evidence in order to establish probable cause for a defendant's arrest clearly violates the Fourth Amendment. *Riley v. City of Montgomery*, 104 F.3d 1247, 1253 (11th Cir. 1997). However, Plaintiff does not allege that he was arrested as a result of this incident, nor does he even allege that any officers questioned him about the cocaine that had been allegedly planted in his home.

Plaintiff's bare allegations do not give rise to a Fourth Amendment claim.

As for Plaintiff's Fifth Amendment claim, the due process clause of the Fifth Amendment applies only to the conduct of federal, not state, actors. *See San Francisco Arts & Athletics Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 (1987). Plaintiff has not alleged any federal involvement in this case, and it is undisputed that the officers are state actors. Plaintiff's claim under the Sixth Amendment also fails because Plaintiff does not allege that he received ineffective assistance of counsel. Finally, it appears that Plaintiff alleges an equal protection claim under the Fourteenth Amendment. To succeed on an equal protection claim, Plaintiff "must first demonstrate that he has been treated differently from other with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty,* 239 F.3d 648, 654 (4th Cir. 2001). Plaintiff appears to allege an equal protection claim based on race, but he fails to allege that any Defendants purposely discriminated against him on the basis of his race. Therefore, Plaintiff's § 1983 claim will be dismissed against Sugrue and Jones.

B. 42 U.S.C. § 1981 Claim Against Sugrue

Plaintiff alleges that Sugrue violated his rights under § 1981 by telling his neighbors that the firebombing incident was drug related, which in turn

obstructed a hate crime investigation. Defendants contend that Plaintiff does not allege that Sugrue intended to discriminate against him on the basis of race, as is required to assert a claim under § 1981.

Section 1981 provides that all persons "shall have the same right to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings. . . ." To state a claim under § 1981, Plaintiff must allege that: (1) he is a member of a racial minority; (2) Defendants acted with an intent to discriminate against Plaintiff on the basis of his race; and (3) Defendants' race discrimination concerned one or more of the protected activities enumerated in § 1981(a). *See, e.g., Brown v. City of Oneonta, N.Y.,* 221 F.3d 329, 339 (2d Cir. 2000); *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir. 1996); *Buchanan v. Consolidated Stores Corp.*, 217 F.R.D. 178, 190 (D.Md. 2003).

As previously explained, Plaintiff's complaint is devoid of any allegations that Sugrue purposefully discriminated against him on the basis of race. Indeed, Plaintiff does not identify his own race in the complaint. In his opposition, Plaintiff explains that he is black and that he was denied "the equal protection that is giving [sic] to white citizens." Even if the court liberally construed Plaintiff's pleadings to include the statements in Plaintiff's opposition, these conclusory assertions do not demonstrate that Officer Sugue's actions were motivated by an intent to discriminate against Plaintiff on the basis of race.

Therefore, Plaintiff's § 1981 claim against Officer Sugrue will be dismissed.

C. 42 U.S.C. § 1985 and 1986 Claims Against Jones, Sugrue, and Powell

Plaintiff alleges that Jones, Sugrue, and Powell "conspired with the other defendants and others to injure plaintiff in his person and property as a result of plaintiff having attending [sic] and testified in a federal civil rights case." (Paper 1 ¶¶ 60, 62, 68). Defendants maintain that even if Plaintiff's claims were not barred by the statute of limitations, Plaintiff fails to state a claim under §§ 1985 and 1986.

To state a claim under § 1985, Plaintiff must allege: (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive Plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to Plaintiff as (5) a consequence of an overt act committed by Defendants in connection with the conspiracy. *Unus v. Kane*, 565 F.3d 103, 126 (4th Cir. 2009). In addition, Plaintiff must "show an agreement or a 'meeting of the minds' by defendants to violate the claimant's constitutional rights." *Simmons v. Poe*, 47 F.3d 1370, 1377 (4th Cir. 1995).

Plaintiff brings his § 1985 claim under subsection two of the statute, which provides:

> (2) Obstructing Justice; intimidating party, witness, or juror

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, feely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit jury in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any matter, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

"The first part of § 1985(2), like § 1985(1), requires 'force, intimidation, or threat. . . .'" *Sellner v. Panagoulis,* 565 F.Supp.238, 246 (D. Md. 1982).

Here, the crux of Plaintiff's § 1985 claim against Sugrue, Powell, and Jones is that they conducted an inadequate investigation of the firebombing incident, told neighbors that Plaintiff was involved in drug activity, and did not investigate his complaints about the conduct of his neighbor Westover, and instead,

issued Plaintiff a trespass notice. Plaintiff does not allege that the officers used force, intimidation, or threats to hinder him from testifying in a pending matter. Plaintiff's only mention of a court proceeding in his complaint is that he had previously filed two suits against Montgomery County. However, these cases were both dismissed on April 4, 2000. The allegations giving rise to Plaintiff's § 1985 claim took place *years after* those cases were dismissed. Therefore, Plaintiff cannot allege that Defendants hindered his ability to testify in the prior proceedings. Accordingly, Plaintiff's § 1985 claim against Sugrue, Jones, and Powell will be dismissed.

Plaintiff also asserts a cause of action under 42 U.S.C. § 1986 against Officer Sugrue. A § 1986 claim may be maintained for neglecting to prevent the conspiracies to commit the wrongs outlined in 42 U.S.C. § 1985. Because Plaintiff fails to state a claim under § 1985, his § 1986 claim cannot succeed. *See Trerice v. Sumons,* 755 F.2d 1081, 1085 (4th Cir. 1985) ("A cause of action based upon § 1986 is dependent upon the existence of a claim under § 1985. . . . Having affirmed the dismissal of plaintiff's § 1985 claim, we also affirm the dismissal of his § 1986 claim."). Therefore, Plaintiff's § 1986 claim against Sugrue will also be dismissed.

D. Claims Against Montgomery County

Plaintiff asserts that Montgomery County violated his rights under § 1981, 1983, and 1986. Because the

claims against the individual police officers will be dismissed, there is no basis for liability for Montgomery County.

V. Defendant Sam Hsu's Motion to Dismiss

Plaintiff alleges that Sam Hsu, a Fire Marshall with the Montgomery County Fire Marshall's Office, violated his civil rights under 42 U.S.C. §§ 1981, 1983, 1985, and 1986. Specifically, Plaintiff alleges that Hsu told neighbors that the firebombing incident was related to drug activity in Plaintiff's home. Assuming that this allegation is not time barred, Plaintiff still does not explain how Hsu's actions violated Plaintiff's constitutional rights. Therefore, Plaintiff's § 1983 claim against Hsu will be dismissed.

Plaintiff's remaining claims against Hsu fail as well. Plaintiff does not allege that Hsu intentionally discriminated against him on account of his race, as required to state a claim under § 1981. As for Plaintiff's §§ 1985 and 1986 claims, Plaintiff does not allege that Hsu used force, intimidation or threats to prevent Plaintiff from testifying in a pending matter, nor does he allege that Hsu entered into an agreement or had a meeting of the minds with other Defendants. Therefore, all claims against Hsu will be dismissed.

VI. Defendant Marcus Westover's Motion to Dismiss

Plaintiff asserts claims against Westover under §§ 1981 and 1985. Specifically, Plaintiff alleges that Westover violated his rights under § 1981 when Westover pointed a gun at Plaintiff while he was walking back from the cemetery. In addition, Plaintiff alleges that Westover entered into a conspiracy with Montgomery County officers as well as with Joy Turner, The President of the Sandy Spring Civic Association, to harass Plaintiff. Westover counters that the gun pointing incident was fully litigated in a prior lawsuit, and is thus barred by *res judicata*. In addition, Westover insists that Plaintiff cannot state a claim of conspiracy under § 1985.

The doctrine of *res judicata* encompasses two concepts: claim preclusion and issue preclusion, or collateral estoppel. *See In re Varat Enters., Inc.*, 81 F.3d 1310, 1315 (4th Cir. 1996) (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). For a prior judgment to bar an action on the basis of *res judicata*, the prior judgment must be final, on the merits, and rendered by a court of competent jurisdiction in accordance with due processes; the parties in the two actions must be either identical or in privity; and the claim in the second action must be based upon the same cause of action involved in the earlier proceeding. *See Grausz v. Englander*, 321 F.3d, 467, 472 (4th Cir. 2003).

Consideration of the defense of *res judicata* on a motion to dismiss is appropriate under the circumstances presented here:

> Although an affirmative defense such as *res judicata* may be raised under Rule 12(b)(6) "only if it clearly appears on the face of the complaint," *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst,* 4 F.3d 244, 250 (4th Cir. 1993), when entertaining a motion to dismiss on the ground of *res judicata,* a court may take judicial notice of facts from a prior judicial proceeding when the *res judicata* defense raises no disputed issue of fact, *See Day v. Moscow,* 955 F.2d 807, 811 (2d Cir. 1992); *Scott v. Kuhlmann,* 746 F.2d 1377, 1378 (9th Cir. 1984); *Briggs v. Newberry County Sch. Dist.,* 838 F.Supp. 232, 234 (D.S.C. 1992), *aff'd,* 989 F.2d 491 (4th Cir. 1993) (unpublished).

Andrews v. Daw, 201 F.3d 521, 524 (4th Cir. 2000); *see also Q Int'l Courier Inc. v. Smoak,* 441 F.3d 214, 216 (4th Cir. 2006). Westover attached public records from the Circuit Court for Montgomery County, Maryland to his motion as well as his reply. Plaintiff does not object to inclusion of this record and in fact concedes that this incident had been litigated previously in the Circuit Court. (Paper 31, at 1).

Here, the elements of *res judicata* are satisfied. First, the Circuit Court entered a judgment on the merits on January 11, 2007. State court judgments are final upon expiration of the time for filing an appeal. In Maryland, "the notice of appeal shall be

filed with 30 days after entry of the judgment. . . ." Md. Code Ann., Maryland Rules § 8-202(a). The thirty day period for filing an appeal expired on February 11, 2007. Therefore, the judgment is final. Second, the parties in both actions are identical. With respect to the third element, the two cases involve the same cause of action. Indeed, Plaintiff concedes this fact when he explains that "the first case dealt only with the incident when Westover pointed a gun at the Plaintiff when he was walking back for [sic] the cemetery on January 23, 2006." (Paper 31, at 1). Therefore, Plaintiff's § 1981 claim is barred by *res judicata*.

Plaintiff's conspiracy claim under § 1985 also fails because Plaintiff does not allege that Westover used force or threats to prevent him from testifying in a pending matter. Therefore, all claims against Westover will be dismissed.

VII. Defendant Joy Turner's Motion to Dismiss

Finally, Plaintiff asserts a single claim under § 1985 against Joy Turner, President of the Sandy Spring Civic Association. Plaintiff alleges that Turner coerced an unidentified woman to give false testimony about him in state depositions and informed the police that he was involved in drug activity and other unlawful conduct. Although extremely unclear, Plaintiff also alleges that Turner "conspired to have people complain to [Plaintiff's] family about Westover interfering with their access to the cemetery and public

easement, as a method of creating traffic at [Plaintiff's] residence." (Paper 1 ¶ 42).

Turner argues that Plaintiff's allegations against her fail as a matter of law. Turner points out that Plaintiff does not allege that she used force, intimidation or threats in carrying out the alleged conspiracy, nor does Plaintiff allege that he suffered injury as a result of Turner's actions, as required to state a claim under § 1985. Furthermore, Turner contends that Plaintiff does not explain the connection between the alleged conspiracy and what, if any, federal court proceeding allegedly inspired Turner to conspire to harm Plaintiff. Finally, Turner points out that Plaintiff does not allege that she entered an agreement or had a meeting of the minds with other Defendants to engage in a conspiracy against Plaintiff. Therefore, Plaintiff's § 1985 claim against Turner will also be dismissed.

VIII. Conclusion

For the foregoing reasons, Defendants' motions to dismiss will be granted. A separate Order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge

FILED: April 6, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-2016
(8:08-cv-03504-DKC)

EDWARD L. DUTTON,

Plaintiff-Appellant,

v.

MONTGOMERY COUNTY MARYLAND; SAM HSU, Captain; MARCUS WESTOVER; D. SUGURE, Officer; JENNIFER POWELL, Officer; MARCUS JONES, Lieutenant; JOY TURNER,

Defendants-Appellees.

ORDER

The Court denies the petition for rehearing.

Entered at the direction of the panel: Judge Duncan, Judge Agee and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Conner, Clerk
